IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GATECO, INC. d/b/a/ GATEWAY INDUSTRIAL SERVICES	:	CIVIL ACTION
v.	:	
SAFECO INSURANCE COMPANY OF AMERICA, and EMPLOYERS INSURANCE OF WAUSAU	:	NO. 05-2869

MEMORANDUM

Bartle, C.J. April 25, 2006

Plaintiff Gateco, Inc. ("Gateco"), a citizen of Pennsylvania, has brought this diversity action against sureties Safeco Insurance Company of America ("Safeco"), a citizen of Washington, and Employers Insurance of Wausau ("Wausau"), a citizen of Wisconsin, to collect payments allegedly due for materials and services rendered by it as a sub-subcontractor on a project for the Port Authority of Allegheny County, Pennsylvania ("Port Authority"). The project concerned the reconstruction and modernization of a five mile portion of track that is a part of the Light Rail Transit System known as the "Overbrook Line." The general contractor, A&L, Inc. ("A&L"), entered into a subcontract with Capital Manufacturing/Williams Graphics, Inc., Capital Joint Venture ("Capital-Williams"), which in turn entered into a sub-subcontract with Gateco. Defendants Safeco and Wausau, as sureties, each issued a bond on behalf of A&L and Capital-Williams, respectively.

Both defendants previously filed motions seeking dismissal for improper venue or transfer to the Western District of Pennsylvania. On October 12, 2005, we issued two orders, the first granting Wausau's motion to dismiss for improper venue because of the forum selection clause in its bond. We denied Safeco's motion in its entirety. Before the court is Safeco's motion for judgment on the pleadings for failure to join indispensable parties or for leave to join such parties as co-defendants.

I.

Under Rule 12(c) of the Federal Rules of Civil Procedure, judgment will only be granted if it is clearly established that no material issue of fact remains to be resolved and that the moving party is entitled to judgment as a matter of law. Inst. for Scientific Info., Inc. v. Gordon & Breach, Sci. Publishers, Inc., 931 F.2d 1002, 1005 (3d Cir. 1991). Safeco's motion contends that the Port Authority, its general contractor A&L, the subcontractor Capital-Williams and its surety Wausau are all indispensable under Rule 19. The rules also permit a party to move for dismissal of the action for failure to join indispensable parties. Fed. R. Civ. P. 12(b)(7). Because Safeco does not appear in actuality to seek entry of judgment in its favor, we will treat the motion as one to dismiss the action under Rule 12(b)(7) in order to proceed in Allegheny County.

In deciding a motion for compulsory joinder, we must first determine whether a party is "necessary" under Rule 19(a).

See Janney Montgomery Scott v. Shepard Niles, 11 F.3d 399, 404 (3d Cir. 1993). A court must join a necessary party if it is feasible to do so. Id. A person or party is "necessary" under Rule 19(a) and shall be joined under the following circumstances if doing so will not deprive the court of jurisdiction:

> (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

Fed. R. Civ. P. 19(a). If we find that a non-party is necessary but joining that party would deprive the court of subject matter jurisdiction, we must then decide if the absent party is "indispensable" under Rule 19(b).

To determine whether a necessary party is indispensable, we must balance the factors set out in the rule as explained in the case law and determine whether "in equity or good conscience the action should proceed among the parties" or should be dismissed. Fed. R. Civ. P. 19(b), 12(b)(7); see also Provident Tradesmens B. & T. Co. v. Patterson, 390 U.S. 102 (1968). Rule 19(b) provides the following factors to guide our analysis as to whether a necessary party is indispensable:

> first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second,

> the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Fed. R. Civ. P. 19(b). Our Court of Appeals has explained that the factors listed in the rule "are not exhaustive, but they are the most important considerations in deciding whether to dismiss the action." Gardiner v. Virgin Islands Water & Power Auth., 145 F.3d 635, 640 (3d Cir. 1998). Due to the equitable nature of the inquiry there is no precise formula for determining whether a necessary party is indispensable.[1] See Enza, Inc. v. We The People, Inc., 838 F. Supp. 975, 978 (E.D. Pa. 1993). In deciding whether an absent party is indispensable courts have also considered (1) plaintiff's interest in selecting the forum; (2) defendant's interest in avoiding multiple litigation, inconsistent relief or sole responsibility for liability shared with others; (3) the interest of absent yet necessary parties; and (4) the interest of courts and the public in complete, consistent and effective settlement of controversies. See, e.g.,

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1. We note that generally a party is not necessary simply because joinder would be convenient, or because two claims share common facts. Otherwise the distinction between compulsory and permissive joinder would be "meaningless." See, e.g., Field v. Volkswagenwerk AG, 626 F.2d 293, 301 (3d Cir. 1980). In addition, other Courts of Appeals have held that a party to a commercial contract between two litigants is not a necessary party to adjudicate rights under the contract. Northrop Corp. v. McDonnell Douglas Corp., 705 F.2d 1030, 1044 (9th Cir. 1983); Francis Oil & Gas, Inc. v. Exxon Corp., 661 F.2d 873, 878 (10th Cir. 1981).

John Hancock Prop. & Cas. Co. v. Hanover Ins. Co., 859 F. Supp. 165, 168 (E.D. Pa. 1994) (citations omitted). If a non-party is necessary, cannot be joined, and is indispensable, the action cannot proceed and must be dismissed. See Janney, 11 F.3d at 404.

II.

Safeco argues that the Port Authority, A&L, Capital-Williams, and Wausau are necessary parties because without them complete relief cannot be accorded between Gateco and Safeco. Fed. R. Civ. P. 19(a)(1). In its reply brief, Safeco belatedly asserts that Capital-Williams is necessary under Rule 19(a)(2)(ii). At the outset we note that the Port Authority, A&L, and Capital-Williams are all citizens of Pennsylvania.[2] Therefore, we cannot join any of them as defendants in this case because to do so would destroy diversity between the parties and deprive us of subject matter jurisdiction. See 28 U.S.C. § 1332; Fed. R. Civ. P. 19.

Sub-subcontractor Gateco seeks payment from Safeco as surety for A&L for materials and services it provided for work performed on the Overbrook Line project. As noted above, Safeco

2. We dismissed Wausau from this case based on the forum selection clause in its bond which required any lawsuit brought under the bond to be filed in a "court of competent jurisdiction in the location in which the work or part of the work is located." None of the work on the Port Authority's rail project is alleged to have been performed in the Eastern District of Pennsylvania.

issued a payment bond to A&L in the amount of $54,522,035.70 for the project. The bond states that

> every person, co-partnership, association or corporation who, whether as subcontractor or otherwise, has furnished material or supplied or performed labor in the prosecution of the [w]ork, and who has not been paid therefore, may sue in assumpsit on this bond, in its own name, and prosecute the same to final judgment for such sum or sums as may be justly due it ...

Labor & Materialman's Bond, at 2. The broad language of the bond covers every entity that furnishes materials or supplies or performs labor in prosecution of the "work," which the bond defines as the construction on the Overbrook Line. Gateco alleges it has not been paid for its work and seeks to recover on the bond. If Gateco prevails in this court and recovers the $557,853 in damages it seeks, it will be made whole. There is no indication that the amount of the bond is insufficient to pay Gateco's damages. Therefore, this court can afford Gateco complete relief.

The text of the Safeco bond also demonstrates that Wausau is not a necessary party. Gateco may bring a suit on the bond and recover payment for any material or labor it supplied to the project. Wausau is not needed to adjudicate Gateco's claim nor does it claim an interest of its own in this dispute. We can award Gateco the relief it seeks without Wausau. Therefore, Wausau is not a necessary party to this dispute.

Safeco further argues that without A&L, Capital-Williams and the Port Authority it cannot be afforded complete

relief. Contrary to Safeco's assertion, A&L is not an indispensable party. In an action by a subcontractor against a surety, the principal is not an indispensable party. Downer v. U.S. Fid. & Guar. Co., 46 F.2d 733, 734-35 (3d Cir. 1931); C. Arena & Co. v. St. Paul Fire & Marine Ins. Co., 1992 WL 368455, *4 (E.D. Pa. 1992); 123 S. Broad St. Corp. v. Cushman & Wakefield, 121 F.R.D. 42, 43 (E.D. Pa. 1988); FinanceAmerica Credit Corp. v. Kruse Classic Auction Co., Inc., 428 F. Supp. 135 (E.D. Pa. 1977).[3] A&L is the principal on the Safeco bond. Therefore, both the law and the language of the bond clearly do not require an entity to sue A&L to recover from the surety, Safeco. Indeed, to require A&L be joined in this case would defeat one of the primary purposes of having a surety, that is, providing creditors, in this case those subcontractors providing materials and services, additional and simple options to recover debts owed. That Safeco may have to sue A&L for reimbursement does not make A&L a party that must be joined. Our Court of Appeals has repeatedly held that simply because a party has a right to contribution or indemnity from a non-party does not render the latter indispensable under Rule 19. See Gardiner, 145 F.3d at 641. "Rule 19(a)(1) focuses on relief between the parties and not on the speculative possibility of further

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3. Safeco relies heavily on Precision Piping, Inc. v. U.S. Fidelity & Guaranty Co., 1990 WL 5156 (E.D. Pa. 1990). That opinion does not cite or distinguish the cases cited above that preceded it. We adhere to the weight of the case law articulated by our Court of Appeals and, more recently, this court.

litigation between a party and an absent person." Soberay Mach. & Equip. Co. v. MRF Ltd., Inc., 181 F.3d 759 (6th Cir. 1999). Therefore, A&L is not an indispensable party.

Capital-Williams and the Port Authority are likewise not necessary under Rule 19(a)(1) to afford Safeco complete relief. Safeco maintains Capital-Williams must be joined because Safeco wishes to assert the "pay-if-paid" clause from A&L's subcontract with Capital-Williams as a defense.[4] We see no reason why Safeco needs Capital-Williams to assert such a defense. The provisions of the contract between A&L and Capital-Williams can be brought before the court without requiring joinder of the latter. Safeco also argues the Port Authority is necessary for it to assert various portions of A&L's contract with the Port Authority and the latter's lack of payment as defenses. Again, we do not see why it is necessary to join the Port Authority to assert these defenses.

Safeco further suggests that to resolve this case we must fully adjudicate liability between the Port Authority, A&L, Capital-Williams, and Gateco. The bond states otherwise. Sureties exist to provide creditors with an alternative avenue for recovery. While it may be easier and certainly would be more efficient to litigate this matter in one court with all

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4. A "pay-if-paid" clause makes payment to entity A by a third party a condition precedent to any payment by entity A to entity B. For example, if a subcontract between a general contractor and a subcontractor contains such a clause, the general contractor is not obligated to pay the subcontractor for its work until the general contractor is itself paid.

interested parties, neither Capital-Williams nor the Port Authority is necessary for the court to grant complete relief.

Safeco maintains that Capital-Williams may also be necessary under Rule 19(a)(2)(ii). Again, it provides that a person or entity whose joinder is not feasible is necessary if

> the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may ... leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

Fed. R. Civ. P. 19(a)(2)(ii). If Capital-Williams recovers fully against Safeco in its Allegheny County case, the former will be paid its full measure of damages, which includes the $557,853 it owes Gateco under the subcontract between them. Therefore, Safeco argues, if Gateco also recovers its full measure of damages in this court, Safeco will be forced effectively to pay the amount twice. We disagree. We first note that Rule 19(a)(2)(ii) requires a "substantial risk" of double payment, which is not present here.[5] If Gateco recovers in this case prior to the completion of the Allegheny County action, there are numerous defenses available to Safeco in the suit Capital-Williams has brought against it, including the affirmative defense of payment. See Fed. R. Civ. P. 8(c); Pa. R. Civ. P. 1030(a). Safeco would demonstrate to the Court of Common Pleas

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5. Obviously, if Safeco prevails in either this court or in the Court of Common Pleas of Allegheny County, it will not be forced to pay twice.

that it had already satisfied whatever portion of Capital-Williams' damages would have been allocated to Gateco. In short, if Gateco obtains a judgment against Safeco in this court, Safeco will be able to reduce or eliminate any award to Capital-Williams that would be paid to Gateco. Likewise, if the suit in Allegheny County is resolved first, this court will be able to adjust any relief appropriately. See, e.g., Fed. R. Civ. P. 19(b). We do not believe the risk that Safeco will have to pay twice for Gateco's work is substantial.

The Port Authority has a statutory right to "join in any proceeding before any ... courts in any matter affecting the operation of any project of the authority." 55 Pa. Cons. Stat. Ann. § 553. Safeco asserts that the statutory rights cannot be satisfied here because the presence of the Port Authority as a defendant would destroy diversity of citizenship under 28 U.S.C. § 1332. The Port Authority, however, has made no effort to intervene in this action. Whether a sub-subcontractor recovers for its work from the surety of the general contractor is hardly a matter of concern to the Port Authority. It will not be bound by any such judgment. Conceivably, if Gateco recovers and Safeco seeks reimbursement from A&L, the latter may sue the Port Authority. This does not make the Port Authority necessary to accord complete relief to the parties before this court.

The Port Authority, A&L, Wausau and Capital-Williams are either not necessary or are not indispensable under Rule 19.

Accordingly, the motion of defendant Safeco Insurance Company of America will be denied.

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ORDER

AND NOW, this 25th day of April, 2006, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that the motion of the defendant Safeco Insurance Company of America to dismiss under Rule 12(b)(7) of the Federal Rules of Civil Procedure (incorrectly denominated as a motion for judgment on the pleadings under Rule 12(c)) is DENIED.

BY THE COURT:

/s/ Harvey Bartle III
C.J.